IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 885 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

ARAB ASUBEN MOHMODBIN SALAM

Appearance:

1. Criminal Appeal No. 885 of 1990
MR K.C.SHAH, APP for Appellant
NOTICE SERVED for Respondent No. 1-3

CORAM : MR.JUSTICE A.M.KAPADIA
and

MR.JUSTICE H.H.MEHTA

Date of decision: 25/02/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

By means of filing this appeal under Section 378 of the Code of Criminal Procedure, 1973 ('the Code' for short), appellant-State of Gujarat has questioned the legality, validity and propriety of the judgement and order dated July 13, 1990 rendered by the learned Sessions Judge, Junagadh in Sessions Case No. 106 of 1988 acquitting the respondents/accused of the offences under Section 20(b)(ii) of the Narcotic Drugs & Psychotropic Substances Act, 1985 ('the NDPS Act' for short) and under Sections 66(1)(b) and 65(E) of the Bombay Prohibition Act ('the Act' for short).

2. As per the prosecution case, on 30.3.1988, V.D.Vaghela, Sub-Divisional Police Officer of Mangrol received an information from Bhikubhai Jivabhai, Police Constable,that accused No.3 (A-3) is keeping Charas in his house and selling the same. On the basis of the said information, Sub-Divisional Police Officer came to Chorwad Police Station, and he, in the company of D.N.Zala, Police Sub-Inspector and other Police Constables and Head Constables of Chorwad Police Station proceeded in their Jeep to the house of A-3. After reaching the house of A-3, they requisitioned the services of two Panchas and with them they entered the house of A-3. When they entered the house of A-3, he was not present in his house, whereas A-1-his wife and A-2-his daughter were present in the house. During the search of his house, nothing incriminating article was found, but from one Naveri, which is situated behind the house of A-3, Charas was found from the pit. On weighing the said Charas it weighed 1 kg and 65 gms. Therefore, A-1 and A-2 were arrested. Subsequently A-3 was also arrested. The said Charas was seized and necessary formalities for sending the sample to the Forensic Science Laboratory was made in presence of the Panchas and panchnama was accordingly prepared. Thereafter, D.N.Zala, Police Sub-Inspector lodged the complaint in Chorwad Police Station against the respondents/accused for commission of the offences under Section 20(b) of the NDPS Act and Sections 66(B) and 65(E) of the Act. Pursuant to the filing of the complaint, investigation was put into motion. On receipt of the report from the Forensic Science Laboratory, certifying that the article sent for analysis was Charas, the charge sheet was filed

against the respondents/accused before the Magisterial Court, who committed the case to the Court of the learned Sessions Judge, Junagadh. On committal, the learned Sessions Judge, Junagadh framed charge at Exhibit-1 against the respondents/accused which was read over to them, to which they pleaded not guilty and claimed to be tried.

3. To prove the case against the respondents/accused, the prosecution has examined four witnesses and also produced the documents upon which reliance was placed.

4. The learned Trial Judge recorded further statement of the respondents/accused under Section 313 of the Code wherein also they denied the prosecution in toto and reiterated that false complaint was filed against them.

5. On appreciation, analysis and evaluation of the evidence, led by the prosecution, the learned Trial Judge disbelieved the case of the prosecution on the premises that I.O. has not collected the evidence as to whether the respondents/accused were the owner or in possession of Naveri. Besides this, it was also held by the learned Trial Judge that Naveri was easily accessible from the Mosque side also as there was a gate from the Mosque, and therefore, offences against the accused were not proved. Resultantly, the learned Trial Judge acquitted the respondents/accused by the impugned judgement and order which has given rise to the present appeal.

6. Mr. K.C.Shah, learned APP for the Appellant State of Gujarat has taken us through the entire evidence on record. It was submitted by him that while acquitting the respondents/accused, the learned Judge has misread the evidence. According to him the case of the prosecution is proved beyond reasonable doubt by the evidence of Panch No.1 who has supported the evidence. It is also asserted by him that there is ample evidence to show that the respondents/accused were in possession of the Naveri at the relevant time from where the contraband article, i.e. Charas was found and recovered. He also emphasized that in view of the report of the Forensic Science Laboratory, which in term, certified that the contraband article was Charas, the whole matter should be reconsidered by this Court and impugned judgement and order should be quashed and set aside and thereby respondents/accused be convicted of the offences which they were charged by allowing this appeal.

7. It be noted that while admitting this appeal, bailable warrant in the sum of Rs.2000 was issued against all the respondents/accused. However, they have elected not to remain present before this Court.

8. We have considered the submissions advanced by Mr. K.C.Shah, learned APP, perused the impugned judgement and order and the Record and Proceedings of Sessions Case No. 106 of 1988. We have also considered the latest pronouncement of the Supreme Court with respect to the statutory provisions contained under Sections 41 to 57 of the NDPS Act.

9. At the outset, be it stated that there is no dispute that the contraband article was recovered from Naveri which is situated behind the house of the respondents/accused. It has also come in evidence that on the Western side of the house, there was a road and on the Eastern side of the house there was a Naveri, and there was a door for going to Mosque, therefore, there was access to Naveri from the Mosque also. From the above referred to topography of the house, it cannot be said that the Naveri was in exclusive possession of the respondents/accused. I.O. has not collected any evidence as to whether the Naveri which was situated outside the house of the respondents/accused was in exclusive possession of the respondents/accused. Therefore, according to us, the learned Trial Judge has very rightly observed in his judgement that it cannot be said that Naveri was in exclusive possession of the respondents/accused.

10. The prosecution has examined PW-1 at Exhibit-10. In his oral testimony he has supported the contents of the Panchnama, however, he has stated that the panchnama was prepared in Police Station wherein he has put his signature. Therefore, it cannot be said that the panchnama was prepared on the spot and as per the narration made in the panchnama. He has admitted in cross-examination that on that day he had not come to Mangrol for specific work but he was brought from Mangrol, meaning thereby he was especially selected by the Sub-Divisional Police Officer, Mangrol to act as a panch. Therefore, no credence can be given to his oral testimony and from his evidence, respondents/accused cannot be convicted of the offences with which they were charged.

11. Besides this, I.O. has violated the statutory provisions contained under Section 41 of the NDPS Act as he has not reduced into writing the prior information

which was received by him before raiding the house of the respondents/accused which is a mandatory provision. On this ground also trial is vitiated.

12. Seen in the above context, we are of the considered opinion that the learned Trial Judge has very rightly reached to the just and correct conclusion which does not warrant any interference by this Court in this acquittal appeal, where scope is very limited, on the contrary it requires affirmation when we are in full agreement with the reasoning recorded by the learned Trial Judge.

13. It may be noted that this is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. The infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal relying on the oral evidence of witnesses, particularly when the evidence has not inspired confidence of the learned Judge who had opportunity to mark demeanour of witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary to either reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the Trial Court, and in our view, the expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) GIRJA NANDINI DEVI V. BIGENDRA CHAUDHARI, AIR 1967 SC 1124, and (2) STATE OF KARNATAKA V. HEMA REDDY AND ANOTHER, AIR 1981 SC 1417.

14. In the case of RAM KUMAR V. STATE OF HARYANA, reported in AIR 1995 SC 280, Supreme Court has held as under:

> "The powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the

> advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal."

15. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents/accused. Suffice it to say that the learned Trial Judge has given cogent and convincing reasons for acquitting the respondents/accused and the learned A.P.P. has failed to dislodge the reasons given by the learned Trial Judge and convince this Court to take a view contrary to the one taken by the learned Judge. Therefore, there is no merit in the acquittal appeal, and the appeal deserves to be dismissed at its inception.

16. Seen in the above context, we do not find any valid reason or justifiable ground to interfere with the impugned judgement and order acquitting the respondents/ accused for commission of the alleged offences with which they were charged. Hence, appeal deserves to be dismissed.

17. For the foregoing reasons, appeal fails and accordingly it is dismissed. As the respondents/accused are on bail, their bail bonds shall stand cancelled and sureties are discharged.

(A.M.Kapadia,J)

(H.H.Mehta,J)

Jayanti*